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**PUBLIC PROCUREMENT IN THE EUROPEAN UNION:
STRIKING THE BALANCE BETWEEN EFFICIENCY AND
TRANSPARENCY**

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ABSTRACT

The aim of this paper is to study the current system of public procurement in the European Union in a qualitative manner. More specifically, to determine whether or not a problem of balance between transparency and efficiency exists. Looking through the history of public procurement legislation of the EU, it can be determined that the evolution of the legislation has followed a cyclical form where the major focus point of a new legislation alters between efficiency and transparency culminating in the latest focus seeming to land on efficiency. Mainly because the new legislation has put a major emphasis on eProcurement designed to streamline the process of public procurement from the very beginning to the very end. I argue that while requirements set forth by the principle of transparency certainly does lengthen the process of public procurement in terms of time required it definitely isn't the only factor in the matter. On top of that efficiency can be defined in multiple different ways that puts the focus on different aspects. For example, efficiency as a measure for cost-efficiency, how much can you get for a certain amount of money. After thorough research I conclude that in the grand scheme of things I don't find a lack of balance between transparency and efficiency. In the end, the lack of efficiency in the matter, which I observed before embarking on the journey to study this matter more thoroughly, cannot be traced to imbalance between the two principles, it is rather the processes themselves.

INTRODUCTION

Public procurement might not be the first thing you think about when one thinks about responsibilities of governments. It nonetheless is very important tool for governments to fight corruption with. Public procurement can also be seen as a too that helps governments with issues of transparency and efficiency.

As defined by OECD, public procurement refers to purchase by governments or state-owned enterprises of goods, services and works.¹ Similarly, European Union legislation states that the scope of EU procurement legislation is procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be no less than the thresholds laid down in Article 4 of Directive 2014/24/EU.²

The topic of public procurement is very relevant at the moment. The amount of public procurements is increasing rapidly. Especially procurements involving companies from different Member States of the EU. One of the goals of the new directives on public procurement was to make it easier for companies in different member states to take part in public procurements in other member states, especially make it easier for SMEs. The increase in procurements has also brought light to the problems within the legislation. For example, the rules for appealing on the case. The current system allows “losing” companies to appeal the decisions without proper grounds. This will in most cases delay the actual process of public procurement for a year as was the case with public procurement by Finnish Tax Administration few years ago. For this reason, I feel that the topic should be studied more and some improvements should be made. In my mind, one of the key issues in public procurement is the right balance between efficiency and transparency in public procurement. In one hand, the purpose of public procurement is to allow public authorities to buy things and services in a way that is transparent and without corruption. On the other hand, the process of public procurement should be as efficient as possible. These two

¹ Public procurement on OECD website, <https://www.oecd.org/gov/public-procurement/>, accessed 20.2.2020

² Directive 2014/24/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014L0024-20180101>, accessed 20.2.2020

aspects are in many cases in direct or indirect conflict with each other and we need to find the correct balance between them.

The aim of this thesis is to study the system of public procurement and determine whether or not the problem of balance between transparency and efficiency exists. And if so, what could be done to improve it. What would be the optimal balance between efficiency and prevention of corruption? How can we achieve a better system of public procurement?

I will be using qualitative method of research for my thesis. I will study all the relevant literature related to public procurement and analyse the problems found within the current system for public procurement, mainly on transparency and efficiency. I will then proceed to determine whether these problems truly exist and what can be done to improve the current system.

As far as the structure of this paper goes I'm going to start off by examining the history of public procurement in Europe on chapter one. We'll start from the creation of the Single Market and move forward in the history by using old directives and International Agreements as points of interests. The aim of this chapter is to help the reader to understand how the concept of public procurement has evolved through the years and how and why we currently have the system we have.

In the second chapter I'm going to explain the current system of public procurement in the European Union. This will help the reader to understand how public procurement functions in reality and therefore allows us to analyse public procurement more in depth.

This brings us to chapter three of this paper. Chapter three is the most important part of this paper as it is the one where I actually analyse the current system of public procurement in the European Union. I'm going to explain the shortcomings of the current system by referring to some real-life cases that very well highlight the problems we are currently facing. I will also take a look on some possible changes to the current legislation and suggest some improvements if deemed possible.

1. HISTORY OF PUBLIC PROCUREMENT

1.1 Five generations of public procurement in the European Union

I will start this paper from the history of the public procurement in the European Union as I think it is very important to understand and know how we have arrived in the present situation. History of public procurement in the EU can be divided into five generations. However, before we go into more detail on this five generations we have to start from the very basis of public procurement legislation.

The basis of public procurement in the EU is derived from provisions of the European Union treaties. One of the first important treaties for public procurement was the EEC Treaty, even though “none of the articles of the EEC Treaty refers expressly to governmental or other public contracts”³. However, certain provisions of it did in fact establish general principles that were also applicable to contracting practices of public authorities. The goal of treaties such as the EEC Treaty was to prohibit barriers to trade between Member States, provide freedom to provide services and the right to services, prohibit discrimination by national origin and regulate public undertakings and monopolies. As we can see this contains three of the “Four Freedoms” of the Union. The four freedoms are the basis for much of the EU legislation and public procurement is no exception.

The problem with this was that the rules were prohibitive in nature, which meant that they insufficiently eliminated the protection granted by Member States to preferential procurement practices.⁴ This meant that more positive legislation was needed to harmonise procurement laws of the Member States.⁵

1.2 First generation: Supply and Works Directives

³ Turpin, C. (1972). Public contracts in the eec. *Common Market Law Review*, 9(4), 411-424.

⁴ Bovis, C. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 10.

⁵ Bovis, C. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 17.

This brings us to the first generation public procurement legislation. The starting point for this generation was the General Programmes adopted by the European Communities (EC) in the 1962. It set out to abolish rules and practices for the award of public contracts which discriminated against foreign undertakings on nationality ground.

Secondly, Commission Directive 66/683/EEC of 7 November 1966 eliminating all differences between the treatment of national products and that of products which, under Articles 9 and 10 of the Treaty, must be admitted for free movement, as regards laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products or making such use subject to profitability was adopted.⁶ In short, this directive prohibited rules requiring the use of national products or prohibiting the use of foreign products in public procurement. Second Directive to be adopted was Commission Directive 70/32/EEC of 17 December 1969 on provision of goods to the State, to local authorities and other official bodies.⁷ This directive applied same rules as Directive 66/683/EEC to public supply contracts.⁸

Third important step in adopting new legislation was the adoption of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts.⁹ The main contribution of this directive was that it introduced three very important principles. Firstly, contracts had to be advertised community-wide. Secondly, technical specifications that could be considered discriminatory were prohibited. And thirdly, it was now required that tendering and award procedures were based on objective criteria. At this point these rules did not apply to public utilities, or to products originating outside the EC. This oversight was amended by Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts,¹⁰ which was followed by the Community approval of the 1979 General Agreement on Tariffs and Trade (GATT), later known as Agreement on Government Procurement (GPA), aim of which was to “subject public purchasing to international competition”¹¹

⁶ Directive 66/683/EEC, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31966L0683>

⁷ Directive 70/32/EEC <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31970L0032>

⁸ Bovis, C. (2007). EU Public Procurement Law. Cheltenham: Edward Elgar Publishing. 18.

⁹ Directive 77/62/EEC, <https://eur-lex.europa.eu/eli/dir/1977/62/oj>

¹⁰ Directive 80/767/EEC, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A31980L0767>

¹¹ Hoekman, B. M., & Mavroidis, P. C. (1997). Law and Policy in Public Purchasing: The WTO Agreement on Public Procurement. University of Michigan Press.

Lastly, to conclude first generation of legislation one more directive has to be mentioned, which is the Council Directive 71/305/EEC of July 1971 concerning the co-ordination of procedures for the award of public works contracts. This directive applied principles of transparency and non-discrimination to the awarding of public works contracts. These principles however did not replace national tendering procedures and practices with a set of common rules.¹² This concludes the first generation of public procurement legislation.

1.3 Second generation: Single European Act and Utilities Directive

We can trace much of the paternity of public procurement all the way back to neo-liberal economic approach to market integration.¹³ Public procurement in the European Union has been very much been influenced by the internal market project.

The starting point for the internal market project can be stated to be the European Commission's 1985 White Paper.¹⁴ It identified that Member States' public procurement policies and practices were a significant non-tariff barrier to free circulation of goods and provision of services in Europe.¹⁵ The reasoning for this was that Member States tended to favour national providers, which then led to sheltering of markets from competition and distorting trade patterns. The 1985 White Paper eventually led to signing of the 1986 Single European Act. As stated by C. Bovis, the 1985 White Paper for the completion of the Internal Market¹⁶ together with the Single European Act, provide for the conceptual foundations of the regulation of public markets of the Member States and European Union procurement law.¹⁷

The aforementioned was a good basis for the Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public

¹² Bovis, C. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 21.

¹³ Bovis, C. (2016). *The principles of public procurement regulation - Research Handbook on EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing

¹⁴ Commission of the European Communities. (1985). *Completing the Internal Market: White Paper from the Commission to the European Council* (Vol. 85). Office for Official Publications of the European Communities.

¹⁵ Bovis, C. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 2-3.

¹⁶ European Commission, White paper on the completion of the Internal Market, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A51985DC0310>

¹⁷ Bovis, C. (2016). *The principles of public procurement regulation - Research Handbook on EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing

supply contracts and repealing certain provisions of Directive 80/767/EEC. In essence, the Directive amended all the previous public supplies directives. At this point, open tendering procedures had become the norm and negotiated procedures were rare.¹⁸ Directive 88/295/EEC also required purchasing authorities to publish their annual procurement programmes and schedules in advance and also to give information on the outcome of award decisions.¹⁹

Similarly, to directive 88/295/EEC, Directive 89/440/EEC also amended previous public supplies directives. This directive also added concession contracts for public procurement. And lastly, some state-subsidised works and consortial participation in contracts was allowed.²⁰

However, the most important addition in the third generation was addition of the first Utilities Directive, Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.²¹ Until this water, energy, transport and telecommunications sectors had not been included in EU public procurement law harmonization.²² As stated by C. Bovis in his book *EU Public Procurement Law* from 2007, this was most likely due to highly divergent national regimes governing them.²³

Lastly, two more important directives were adopted, the Remedies Directives, Directive 89/665/EEC and 92/13/EEC. The aim of these directives was to “ensure effective and rapid review of decisions taken by contracting authorities which infringe public procurement provisions”.²⁴

1.4 Third generation: Services Directives

Third generation of EU public procurement legislation can be seen starting after the completion of single market project in 1992. The focus now shifted towards services sector as its economic importance had been steadily rising. The first major step towards this new focus was adoption of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts. The aim of this new directive was liberalisation of public service sector using similar regime as in the directives governing the procurement of goods, work and

¹⁸ Bovis, C. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 23.

¹⁹ See Article 9 of Directive 88/295

²⁰ Bovis, C. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 23-25.

²¹ Directive 90/531/EEC, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31990L0531>

²² Bovis, C. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 26-27.

²³ Bovis, C. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 26-27.

²⁴ Bovis, C. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 39.

public utilities. The directive also introduced a special type of award procedure, Design Contest. Directive 92/50/EEC excluded some branches of service and service concessions.²⁵ As stated by C. Bovis, this was likely due to some national constitutional restrictions on outsourcing public services.²⁶ One major concept in Directive 92/50/EEC was the introduction of “priority” and “non-priority” services. As explained by C. Bovis, the idea behind this was that all procurement disciplines applied to “priority” services and only basic discrimination and public rules would apply to “non-priority” services.²⁷

Last part of the third generation public procurement legislation consists of the directives from 1993. In 1993 three new directives were introduced, 93/36/EEC, 93/37/EEC and 93/38/EEC. These basically re-introduced the old Supplies, Works and Utilities directives in a consolidated form. Also, some changes were made to the Works Directive in order to make it clearer.²⁸

1.5 Fourth generation: 2004 Directives: Modernisation and simplification

In 1996 the Commission published a Green paper called “Public Procurement in the European Union: Exploring the way forward”. The paper got around 300 responses from different sectors, including Member States, institutions and other economic sectors.²⁹ From the responses to this Green Paper the Commission gathered that there is obvious need for simplified framework for public procurement that would cater to the challenges brought forward by the new electronic age.

This meant that changes to Directive 93/38/EEC were needed and the best way to achieve this was by adopting a new directive. The aim of the new Directive 2004/17/EC was to not change too much of the substance of the old Directive 93/38/EC but more in restructuring and amending of the Directive 93/38/EC in a way that it is clearer and easier to use.

This aim was achieved by dividing the Directive to four Titles, General provisions applicable to contracts and design contests, Specific provisions applicable to contracts, Specific provisions

²⁵ Bovis, C. (2007). EU Public Procurement Law. Cheltenham: Edward Elgar Publishing. 41.

²⁶ Bovis, C. (2007). EU Public Procurement Law. Cheltenham: Edward Elgar Publishing. 43.

²⁷ Bovis, C. (2007). EU Public Procurement Law. Cheltenham: Edward Elgar Publishing. 44.

²⁸ Bovis, C. (2007). EU Public Procurement Law. Cheltenham: Edward Elgar Publishing. 35.

²⁹ Heblly, J.M., 2007. European Public Procurement: Legislative History of the ‘Classic’ Directive 2004/18/EC. Kluwer Law International BV.

applicable to design contests and Final provisions. The provisions were restructured so as to logically follow the procedure of contract awarding. Also, chapters, sections and sub-sections were added to make the new directive easier for readers.

Furthermore, headings were added for titles, chapters, sections and sub-sections for faster identification of the subject matter.³⁰ As stated by J.M. Hebly, “another element of simplifying the Directive is the grouping together in one and the same Article of the specific provisions concerning a given activity”.³¹

Even though the aim was not to change the substance too much some changes to the substance of the Directive had to be made. For example, the old Directive stated an obligation to notify of the outcome of an award procedure to those contracting entities which operate in the sectors covered by the Government Procurement Agreement (GPA).³² The new Directive extended this obligation to include all contracting entities. This was an important step for the transparency of European Union public procurement legislation, which today is a very important principle of the current legislation and the subject as a whole.

Directive 2004/17/EC was not the only new Directive to be adopted. The other three old directives were combined together as a new directive, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. This directive basically governed all procurement by public authorities except the utilities sector.

Lastly, in 2007 the Remedies Directives from 1989 and 1992 were also amended. This new directive, Directive 2007/66, “aimed to improve the effectiveness of review procedures concerning the award of public contracts”.³³

³⁰ Hebly, J.M., 2007. *European Public Procurement: Legislative History of the ‘Classic’ Directive 2004/18/EC*. Kluwer Law International BV.

³¹ Hebly, J.M., 2007. *European Public Procurement: Legislative History of the ‘Classic’ Directive 2004/18/EC*. Kluwer Law International BV.

³² Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993L0038>

³³ Directive 2007/66/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007L0066>

To put it short, the legislative history of EU public procurement legislation has followed a rather simple cycle. It started with the first generation legislation that aimed to supervise procurement of supply and works. The second generation added utilities to the sphere of public procurement legislation. The next step in this legislative process was to add services to the list of sectors that were supervised. The third generation also started the cycle of simplification and modernisation by re-introducing old supplies, works and utilities directives in a simpler form. The fourth generation continued this cycle of simplification and modernisation by considering the effects of digital age to public procurement. We can see that the EU public procurement legislation has followed a cycle of reformation where around every ten years a new generation has been introduced.

This brings us to the next chapter of this paper, the fifth generation, the current system of public procurement in the European Union.

2. FIFTH GENERATION, THE CURRENT SYSTEM

2.1 Fifth generation: Further modernisation and eProcurement

Currently public procurement in the European Union is based on the newest directives and World Trade Organization's (WTO) Government Procurement Agreement (GPA) and other international agreements.

Before going further into European Union procurement legislation, it is important to note that the EU does not exist in its own vacuum of space. Huge amount of trade happens with economic operators outside of the EU as well and for this reason we have to consider international agreements such as the GPA, which is arguably "the most important international agreement aimed at opening procurement markets to international competition"³⁴. As I mentioned the GPA is plurilateral agreement, that regulates procurement of goods and services of public authorities party to the agreement. It is based on principles of openness, transparency and non-discrimination.

The current system of public procurement in the European Union is largely based on directives adopted in 2014 and incorporated in 2016 and their amendments. This new legislation includes three new directives, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

It is easy to say that the new generation of legislation has profoundly changed the way EU countries and public authorities spend large part of the 1.9 trillion euros used for public procurement annually. As stated by the European Commission, "the revised legislation is designed

³⁴ Reich, A. (2009). The new text of the agreement on government procurement: an analysis and assessment – *Journal of International Economic Law* 12(4). p. 990.

to further open up the EU's public procurement market to competition, prevent "buy national" policies and promote free movement of goods and services".³⁵ Moreover, also emphasised by the European Commission is that the purpose of the new directives is to make it easier and cheaper for small and medium -sized enterprises, also known as SMEs, to bid for public contracts, and to ensure the best value for public purchases and respect the European Union's principles on transparency and competition.³⁶ The aspect of simplifying legislation in order to encourage SMEs to bid for public tenders is a welcome one as smaller actors have historically perceived the legislation to be too complicated and therefore inhibit them from participating in tendering.³⁷ This new legislation, as is the current trend in EU legislation, allows and encourages progress towards certain public policies and allows environmental and social considerations.³⁸

In this generation of legislation, the EU has taken special notice on eProcurement that can help increasing efficiency and help SMEs. As stated by the European Commission, the new rules try to simplify public procurement procedures through smarter rules and wider use of eProcurement.³⁹ For example, European Commission introduced some new initiatives aimed at boosting eProcurement. One of the initiatives was the European Single Procurement Document (ESPD), which is a form used for proving that a bidder fulfils the exclusion and selection criteria.⁴⁰ The ESPD replaced all the various other forms used by the EU countries for the same purpose. Second important initiative is E-Certis, which provides information on certification requirements and helps to identify and compare different certificates requested in procurement procedures across the EU.⁴¹ The third and maybe the most significant initiative of the European Commission was that eProcurement became mandatory in 2018. This means that all communication within public procurement processes must happen electronically. Lastly, the "once-only" principle was

³⁵ European Commission, EU Public Procurement reform: Less bureaucracy, higher efficiency <http://ec.europa.eu/DocsRoom/documents/16412/attachments/1/translations>, accessed 8.4.2020

³⁶ European Commission on public procurement, https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en, accessed 20.2.2020

³⁷ Karjalainen, K. and Kemppainen, K. (2008) The Involvement of Small- and Medium-Sized Enterprises in Public Procurement: Impact of Resource Perceptions, Electronic Systems and Enterprise Size. *Journal of Purchasing and Supply Management*, 14. P. 230–240.

³⁸ European Commission on public procurement, https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en, accessed 20.2.2020

³⁹ European Commission, EU Public Procurement reform: Less bureaucracy, higher efficiency <http://ec.europa.eu/DocsRoom/documents/16412/attachments/1/translations>, accessed 8.4.2020

⁴⁰ European Commission, EU Public Procurement reform: Less bureaucracy, higher efficiency <http://ec.europa.eu/DocsRoom/documents/16412/attachments/1/translations>, accessed 8.4.2020

⁴¹ European Commission, EU Public Procurement reform: Less bureaucracy, higher efficiency <http://ec.europa.eu/DocsRoom/documents/16412/attachments/1/translations>, accessed 8.4.2020

introduced. It aims at creating such an ecosystem for eProcurement, which facilitates “a seamless interaction of businesses with public buyers”⁴².

This new focus on eProcurement has also helped give rise to other eProcurement tools other than those by the EU. Good example of such eProcurement service is Clouidia, which is used by many public authorities and private undertakings in Finland, for example the Finnish Tax Administration. Clouidia allows whole procurement proceedings to be handled electronically from the very beginning to all the way through the contracting period. Services like these have greatly helped reduce waste and produce better procurement results. This notion has also been observed by Helen Walker in her paper “The relationship between sustainable procurement and e-procurement in the public sector”.⁴³

The modernisation of procurement legislation has also helped to modernise public administrations. Unsurprisingly, this modernisation of public administrations has led to more efficient procurement processes altogether as more emphasis has been put towards internal procurement procedures.

The European Commission has stated that because authorities now have more freedom in organising procurement procedures in more flexible and efficient way, they can “speed up procedures due to shorter minimum time-limits for participation and submission of tenders, choose the best quality-price ratio option instead of having price as the sole criterion, save cost and bureaucracy with the help of ESPD and exclude bidders from procedures if they have previously shown significant and persistent deficiencies during the execution of public contract”.⁴⁴

The new legislation also introduced other changes aimed at simplification and increased efficiency. The new rules allow local and regional authorities to advertise their contracts with less burdensome notices instead of complex contract notices.⁴⁵ Other important step was in regards to cross-border checks of procurement information by public authorities. Public administrations could now verify the information and documentation they receive from foreign undertakings using

⁴² European Commission, EU Public Procurement reform: Less bureaucracy, higher efficiency <http://ec.europa.eu/DocsRoom/documents/16412/attachments/1/translations>, accessed 8.4.2020

⁴³ Walker, H. (2012). The relationship between sustainable procurement and e-procurement in the public sector – *International Journal of Production Economics*. Amsterdam: Elsevier.

⁴⁴ European Commission, EU Public Procurement reform: Less bureaucracy, higher efficiency <http://ec.europa.eu/DocsRoom/documents/16412/attachments/1/translations>, accessed 8.4.2020

⁴⁵ European Commission, EU Public Procurement reform: Less bureaucracy, higher efficiency <http://ec.europa.eu/DocsRoom/documents/16412/attachments/1/translations>, accessed 8.4.2020

the Internal Market Information System (MIM).⁴⁶ This helps reduce the doubt surrounding the authenticity of information and documentation provided by tenderers from other Member States.

One very important underlying aim of the new legislation was to create “a culture of integrity and fair play”⁴⁷. If this aim was to be achieved as intended we would end up with truly efficient public procurement procedures. As the legislation becomes less strict and allows more freedom for the tenderers to choose how to organise procurements, the more efficient it will be. However, the problem with this kind of legislation that allows many freedoms for tenderers, is that if the fair-play elements and culture are not implemented correctly we can end up with a legislation that can be abused. We will circle back to this point in the next chapter of this paper.

2.2 Important concepts of Public Procurement

In order to fully understand the current system of public procurement in the European Union I suggest we study the main concepts of public procurement. These concepts are explained very well and clearly in the book “The principles of public procurement regulation - Research Handbook on EU Public Procurement Law” by Christopher Bovis. In this section of the paper I’ll go through some of the most important concepts of modern public procurement in a list like fashion.

First concept mentioned is “eligibility of bodies governed by public law to tender”. In the public sector Directive, it is clearly stated that entities which are covered by its rules can participate in the award of public contracts, alongside private sector undertakings.⁴⁸ As C. Bovis has stated, it is important that participation of a public body as a tenderer does not interfere or cause distortion to competition in relation to private tenderers.⁴⁹ Now the obvious point of this concept is to determine who are the bodies that can tender and are therefore governed by the legislation. Many private entities conduct procurements in accordance with this law even though they are not governed by it.

⁴⁶ European Commission, EU Public Procurement reform: Less bureaucracy, higher efficiency <http://ec.europa.eu/DocsRoom/documents/16412/attachments/1/translations>, accessed 8.4.2020

⁴⁷ European Commission, EU Public Procurement reform: Less bureaucracy, higher efficiency <http://ec.europa.eu/DocsRoom/documents/16412/attachments/1/translations>, accessed 8.4.2020

⁴⁸ Directive 2014/24/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>

⁴⁹ Bovis, C. (2016). The principles of public procurement regulation - Research Handbook on EU Public Procurement Law. Cheltenham: Edward Elgar Publishing. 5.

Second concept, “Joint and centralized procurement” entails that the contracting authorities of Member States have the “freedom to make provision for contracts for the design and execution of work to be awarded jointly”.⁵⁰ However, this decision must be determined by economic and qualitative criteria defined by national law. The reason for such concept is that public procurement can “benefit from scale economies and streamline planning, operation and deliveries”.⁵¹ These kinds of joint procurements can be very efficient or not as Member States working together have much more resources to use but at the same time in these cases there are many moving parts which can lead to rather slow procurement processes.

Third concept, “Official list of contractors” refers to use of central system of certification of private and public undertakings created for the purpose of “providing evidence of financial and economic standing as well as levels of technical capacity in public procurement selection and qualification procedures”.⁵² This concept relates more to the efficiency aspect of public procurement as it allows contracting authorities to quickly see which companies truly fulfil the requirements for the procurement at hand.

Fourth concept, “Competitive dialogue” means a new procurement procedure reserved for exceptionally complex contracts, to cases “where the public entity knows what outcome it wants in the procurement but does not know how to best achieve it”.⁵³ It allows contracting authorities to discuss the subject of the procurement together with the possible bidders with the view of identifying the best solution. Again, this improves the efficiency aspect of the public procurements as it allows the parties to discuss together how best to achieve the objective of the procurement. It is important to note that at the beginning of the lifecycle of this generation of legislation this procedure was quite rarely used, but is something that at the moment is rather fashionable and is more commonly known as innovation procurement.

⁵⁰ Bovis, C. (2016). The principles of public procurement regulation - Research Handbook on EU Public Procurement Law. Cheltenham: Edward Elgar Publishing. 7.

⁵¹ Bovis, C. (2016). The principles of public procurement regulation - Research Handbook on EU Public Procurement Law. Cheltenham: Edward Elgar Publishing. 7.

⁵² Bovis, C. (2016). The principles of public procurement regulation - Research Handbook on EU Public Procurement Law. Cheltenham: Edward Elgar Publishing. 7.

⁵³ Burnett, M. (2009). Using Competitive Dialogue in EU Public Procurement – Early Trends and Future Developments,

https://www.researchgate.net/publication/48664518_Using_competitive_dialogue_in_EU_public_procurement-Early_trends_and_future_developments.

Fifth concept, “Framework procurement”, also known as “framework agreements” is also quite new and important procurement procedure. It is an agreement where one or more contracting authorities and one or more economic operators, where the parties establish terms and conditions of public contract which is to be awarded in the future.⁵⁴ This procedure is nowadays very common in many procurement sectors as it allows public authorities to efficiently award contracts when they are needed as most of the terms and conditions have already been agreed upon and the possible tenderers are already known. However, this procedure also has some significant drawback in terms of efficiency.

The problem with framework agreements is that they lock both the authorities and suppliers to the agreement for typical term of four years which can result in an agreement that is in the end best neither to the authority or the supplier. Framework agreements also bar out any possible suppliers that did not join the framework agreement before the closing date for the period of the framework agreement. To combat this Directive 2014/24/EU Article 33 introduced another system of procurement called Dynamic Purchasing System (DPS), which is an important concept in itself. The purpose of DPS is to combat the downsides of traditional framework agreements. DPS is fully electronic system that similar to framework agreement is established for a set period of time. The difference is that DPS allows suppliers to join and leave at any time during the agreement period which allows greater number of participants, which in turn boosts the efficiency of procurements themselves in terms of value gained.

Sixth concept of the book is “Electronic procurement”. I have already talked about eProcurement quite extensively so I’m not going to go too much into detail in it here. But I want to express that as we already talked about in the second concept, Joint and Centralized procurement, streamlining the processes can have a huge impact on the efficiency of procurement processes. This is exactly why eProcurement is so important. eProcurement allows streamlining much more extensively than regular procurement especially in repetitive purchasing. I would personally go as far as saying that eProcurement is the single most important advancement of procurement law when it comes to efficiency of procurement processes.

Traditionally the award criteria for public procurement has been “most economically advantageous offer” meaning that traditionally the cheapest offer will be awarded with the contract. This brings

⁵⁴ Bovis, C. (2016). *The principles of public procurement regulation - Research Handbook on EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 10.

us to the seventh concept, “The award criteria and the introduction of policies in public procurement”. Even though courts have still mostly held a favouring position most economically advantageous offer the court has recognised the discretion of authorities to use other non-economic criteria when awarding contracts, mainly based on policies such as sustainability etc.

Eighth and last concept I want to talk about is, “Small and medium enterprises”, which contrary to C. Bovis I formulate as the need of getting SMEs more involved, which directly merges with the policy of the Commission as stated earlier.⁵⁵ Helping getting SMEs involved in public procurement is an excellent way to boost innovation and to giving new perspective on old things. Involving SMEs is very much in line with the current trend of innovation procurement where the aim is to create partnerships which allow authorities and private undertakings to together construct and innovate new and better results in terms of efficiency and public policy.

As we can see from the above-mentioned concepts, the EU has in recent years put enormous amount of emphasis on streamlining and simplifying the legislation and procedures. As the result of this the efficiency of public procurement procedures has increased tremendously. This is an obvious improvement for the whole field.

To conclude this chapter, the fifth generation of EU public procurements has greatly expanded on the aim of modernisation started in the fourth generation. It started from the adoption of the 2014 Directives and still continues to this date. It has introduced some new procurement procedures that have had great effect on the efficiency of public procurement in the EU. The new legislation also tackled the problems of cross-border procurement by introducing new systems such as the Internal Market Information System. Perhaps the most significant change has been the “introduction” of eProcurement as the main procedure, which became the new norm in 2018. eProcurement itself has been a great driving force for further streamlining and increase in efficiency of public procurement procedures. The Directives that set out to simplify the procedures of public procurement has so far seemed to achieve their goals quite well. But perfect it is not.

⁵⁵ Sjøfjell, B., Wiesbrock, A. (Eds.). (2015). *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder*. Cambridge: Cambridge University Press.

3. ASSESSING THE BALANCE BETWEEN EFFICIENCY AND TRANSPARENCY.

As mentioned before “public procurement is a key economic activity of governments”⁵⁶ and it “accounts for large proportion of Gross Domestic Product (GDP) of the EU Member States”⁵⁷. This makes Public procurement “a powerful exercise”.⁵⁸ “The main objectives of EU public procurement policy are to increase the efficiency of public spending and to support the attainment of Single Market”.⁵⁹ Now, as we have seen the European Union has put major emphasis on boosting efficiency and transparency in public procurement procedures in the recent years as evident by the aims of the newest legislation. But some questions still remain to be answered. Where do we stand on the balance between principles of transparency and efficiency? What is their relation to one another altogether? And is this something that needs more attention. First I will have to explain how I perceive these two very important principles in light of this paper.

3.1 Principle of Transparency

Transparency is one of the most important principles of public procurement. It focuses on two main aspects. First, it creates a system of openness in public procurement, which allows greater amount of accountability of economic operators and helps eliminate discrimination based on accountability.⁶⁰ Secondly, transparency aims to ensure that public procurement represents “basis for a system of best practice for both parts of the equation”.⁶¹ The latter is achieved by encouraging supply-side operators to take part in determining needs of the demand-side. This principle of

⁵⁶ Piga, G. (Ed.), Tatrai, T. (Ed.). (2016). *Public Procurement Policy*. London: Routledge. 1.

⁵⁷ Piga, G. (Ed.), Tatrai, T. (Ed.). (2016). *Public Procurement Policy*. London: Routledge. 1.

⁵⁸ Bovis, C. (2015). *The Law of EU public procurement*. Oxford: Oxford University Press.

⁵⁹ Georgopoulos, A., Hoekman, B. M., Mavroidis, P. C. (Eds.). (2017). *The internationalization of government procurement regulation*. Oxford: Oxford University Press.

⁶⁰ Bovis, C. (2016). *The principles of public procurement regulation - Research Handbook on EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 35.

⁶¹ Bovis, C. (2016). *The principles of public procurement regulation - Research Handbook on EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing. 35.

transparency in public procurement is mostly achieved by enforcing different kinds of mandatory notifications and publishing of tenders. In essence, principle of transparency is the key factor in ensuring fair competition between undertakings.

Public procurement has always been a “hot spot for corruption” as stated by G. Piga⁶² and huge amounts of public funds are wasted because of corruption every year. This funnily enough makes a straight correlation between principles of transparency and efficiency. Maybe principle of transparency doesn't always go against principle of efficiency and rather complement one another. It is also important to state that principle of transparency is one of the most effective means of combating corruption in public procurement, which I why it is of paramount importance to make sure that transparency is in balance with efficiency so that corruption does not get out of hand but at the same time the resources of public authorities are used efficiently.

3.2 Principle of Efficiency

Efficiency as a concept can be looked at from many perspectives which is why it is sometimes hard to give it a concise definition. In essence, by efficiency in this paper I mean how efficiently can procurement procedures be conducted and how much money will be used for conducting these procedures and how much mandatory bureaucracy there is. Efficiency can be measured for example on how many hours of work is needed to complete certain steps of procurement procedure and how much that will cost for authorities and economic operators. Other important aspect of efficiency is how much can an authority get for certain amount of money, which closely links it to market competition. Usually the more there are interested parties and offers the more an authority can get for their money.

While increase in efficiency can greatly affect how much public funds are used to conduct procurement processes it also tends to increase the possibility of corruption as well. As authorities enjoy more freedom to design contract awards as they please the more possibilities there are for them to design them in a way that is anti-competitive, corrupt.

⁶² Piga, G. (Ed.), Tatrai, T. (Ed.). (2018). *Law and Economics of Public Procurement Reforms*. London: Routledge.

As we have seen from the previous chapters, the European Union procurement legislation has taken huge steps in efficiency. There are new procurement procedures that can very efficiently handle contracts that used to be really hard to execute, new systems that utilize electronic means, both public and private. The current procurement procedures have been very much streamlined to almost perfection. But as one might have noticed aspects of transparency hasn't been anywhere near as prominent in recent legislation as efficiency. This clearly shows a balance shift towards more efficient procurement proceedings at the cost of aspects of transparency. This to me demonstrates EU's willingness to trust public authorities more than in the past. This shift allows us to question the balance of these extremely important concepts of public procurement.

3.3 Transparency and efficiency in terms of time required to conclude public procurement

The case that got me thinking about this subject in the first place was the case of VERO vs IMB from 2012. This case being from 2012 meant that it was resolved under the old legislation, which got me thinking what is the situation now with the new legislation. Under the old legislation we had cases where procurement procedures were delayed by years, the aforementioned being one of them, simply for the reason that "if we cannot win, they cannot either". VERO was conducting a procurement of new system, worth 226 million euros, under framework agreement. They got two bids, one by Fast-Nortal grouping and one by IBM. VERO decided to exclude IBM's offer due to abnormally low tender. Such action is permitted under Finnish law in article 63 of Act on Public Procurement and Concession Contracts. This article is derived from Article 69 of the Directive 2014/24/EU. In this case the tender offered by IBM was 40% lower than Fast-Nortal grouping's and even more significantly lower than the estimate of VERO, which was based on thorough market research. IBM decided to appeal the decision and subsequently lost the case in the Market Court of Finland. However, because of this legal battle the implementation of the system provided by Fast-Nortal grouping was delayed by over a year. To those familiar to the subject it is quite easy to conclude that IBM never really had the chance to win the case but rather one key purpose of the appeal most likely was that they wanted to interfere with their competitor's business as delays of this magnitude can have serious financial consequences to parties involved and definitely is not very efficient in the grand scheme of things. Public procurement proceedings can already take up years to be finished in the first place and if we start adding years for every unnecessary legal battle we'll never be able to achieve anything in the set timeframe and once we finally do the

products tendered can already be outdated. This case was one of the reasons why I chose this topic. Unfortunately, the more I read about the subject the more I realized that the problems of the current system lie elsewhere other than the long wait times for appeals.

It is a fact that many public procurements take up long time to be completed because of the many steps and subsequent waiting periods required by the legislation. However, the introduction of eProcurement has significantly reduced the amount of time elapsed waiting unnecessarily as all procurements have moved to electronic form. This means that the time needed to complete any public procurements depend mostly on the mandatory waiting periods set forth by the law in order to fulfill the transparency requirements. These, in my mind, seem to be very much within reasonable range if we consider the purpose of this. For example, there needs to be time for the undertakings to produce a valid offer. Without such time window there wouldn't be any offers and the whole procedure would be useless.

So, in the end, I have arrived to the conclusion that principle of transparency is rather in line with the principle of efficiency in terms of time required to complete a procurement from start to finish. Reason for this being that the introduction of mandatory eProcurement and other streamlining methods have removed much of the unnecessary time-consuming hassle associated with the previous generations of public procurement, e.g. Posting of the tenders through traditional means. This has left the waiting times associated with requirement of transparency in place but I would argue that the benefits of them far outweigh the drawbacks they produce in terms of efficiency.

3.4 Efficiency in terms of cost-effectiveness

As I have mentioned earlier one of the key aspects of public procurement has traditionally been cost-effectiveness of public procurements. A notion confirmed numerous times by courts.⁶³ Again, as I have come to realize. The current problems with cost-effectiveness have less to do with imbalance of the two talked about principles and more to do with competition. Having talked to sources close to the subject it seems that the main problem, at least in Finland is that there are not many offers presented to tenders which means that true competition does not really exist. Without healthy competition the prices of services and therefore offers do not necessarily represent a true

⁶³ Bovis, C. (2016). The principles of public procurement regulation - Research Handbook on EU Public Procurement Law. Cheltenham: Edward Elgar Publishing. 15

worth of services provided. For this reason, it is of paramount importance to get more SMEs involved. Getting them more involved will help increase healthy competition which in turn will drive prices down and make public procurement more efficient for public authorities.

3.5 Harmonization of the transparency rules in national level

As stated by Kirsi-Maria Halonen in ‘Disclosure rules in EU Public Procurement: Balancing between competition and transparency’ (2016), “requirement of transparency, open electronic access to contract notices and invitations to tender are promoted and required under the new 2014 EU Public Procurement Directives”⁶⁴. To me the problem is that the new legislation is silent on the actual tenders. It is not required by the EU law to disclose any specifics of the actual tenders submitted. Such discretion solely falls to national law. This means that some Member States, such as the Nordic Countries, do in fact disclose parts of the submitted tenders but some Member States do not. For example, in Finland most public tenders are posted on a site called www.tutkihankintoja.fi for anyone to look at.

These kinds of differences raise the question of harmonization of national laws in the field of public procurement. Could that be a deciding factor in economic operations’ decision-making process. I certainly understand how that can be a factor for undertakings. Maybe they don’t want to take part in public procurement in some Member States because they do in fact disclose some information about the tenders that they wouldn’t want to be disclosed. Wouldn’t that be in a way counterproductive if we consider the European Single Market, which has greatly affected the EU public procurement legislation. Certainly, not having to disclose any part of the submitted tenders is more efficient than disclosing parts of the tenders. Obviously, the full tenders cannot be disclosed as they most often include material that falls under trade secret, and therefore someone would have to go through the full tender with all the annexes. That, I can tell you, is not very fast as tenders with all the annexes can consist of hundreds of pages.

This raises the question whether EU should take more active role in deciding what and how certain information relating to tenders needs to be handled. It would certainly help with the harmonization of national laws of Member States. Furthermore, I would suspect that taking more prominent

⁶⁴ Halonen, K. M. (2017). Disclosure rules in eu public procurement: Balancing between competition and transparency - *Journal of Public Procurement*. 16(4). Bingley: Emerald Publishing.

stance on the matter would benefit the Single Market as a whole. But that is a question for another time.

3.5 Targeted scoring

The problem of balance between transparency and efficiency is rather complicated. In some ways they go hand in hand but in some they can seriously hinder one another. For example, we can think about transparency as a safeguard against anti-competitive behavior and policies, and corruption. In this case, we have to think about all the extra steps that have to be taken in order to achieve that goal, for example the requirement of publishing the results of procurement procedure.

The current legislation imposes public authorities with many obligations to notify every party on the process of procurement. Some scholars have even gone as far as to state that “EU public procurement rules tend to facilitate excessive market transparency”⁶⁵ This statement actually makes quite a lot of sense considering EU legislation require contracting authorities to disclose to “any tenderer that has made an admissible tender ... the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer or the parties to the framework agreement”⁶⁶ One situation where EU’s hunger for more efficient public procurement processes may have come at the expense of anti-corruption has to be talked about. The new legislation allows public authorities to design descriptions of the subject of the procurement and how they score tenders quite freely. This has also been noted by Joaquin Nunes de Almeida who has stated that “the design of public procurement rules plays a key role in determining the efficiency of the system to provide tax-payers value for money”.⁶⁷ This new freedom could allow procuring authorities to design their procurements in a way that is aimed at choosing certain tenderer. For example, if the authority is conducting public procurement for new chairs and already knows that they want to buy the chairs from one specific company, they could design the procurement process in a way that gives highest score to that offer. They can for example give certain aspects of the products

⁶⁵ Sanchez-Graells, A. (2019). Transparency and competition in public procurement: a comparative view on their difficult balance - *Transparency in EU Procurements*. 4.

⁶⁶ Article 55(2) of Directive 2014/24/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>

⁶⁷ Piga, G. (Ed.), Tatrai, T. (Ed.). (2018). *Law and Economics of Public Procurement Reforms*. London: Routledge.

more weight in the scoring than others if they know that the specific product they want would do great in that aspect. I would call this “targeted scoring”. Unfortunately, the legislation is still quite new and there aren’t any major cases on the subject, yet at least.

3.6 Some concluding notes

As I have mentioned earlier the current “hot” and upcoming trend in public procurement is innovation procurement, a procedure where the purpose is to boost innovation and create lasting partnerships. Innovation procurement provide SMEs with great opportunities as a contract with public authority can provide them with much needed funding. SMEs can often have a fresh perspective on things which I am sure all public authorities will welcome with open arms. This is also a great news for the EU as getting SMEs involved was one of the key objectives of the new legislation. This change can already be notices as stated by Hans Knutsson in his article “Innovation in the Public Procurement Process: A study of the creation of innovation-friendly public procurement”.⁶⁸

After having gone through the process of research I have come to understand that the problems I thought existed had far less to do with balance of transparency and efficiency than I thought and more with evolution of the law and competition in general. As stated originally by Catriona Munro in book ‘Competition law and public procurement: two sides of the same coin?’ (2006), “the fact that transparency in procurement procedures, and in particular during the post-award debriefing and litigation phases, can result in distortions and restrictions of competition is much less widely acknowledged”, a statement later confirmed by Mr. Sanchez-Graells in the book *Transparency and Competition in Public Procurement: A Comparative View on Their Difficult Balance*.⁶⁹

⁶⁸ Knutsson, H., Thomasson, A. (2014) *Innovation in the Public Procurement Process: A study of the creation of innovation-friendly public procurement - Public Management Review*. London:Routledge.

⁶⁹ Catriona M. (2006). *Competition Law and Public Procurement: Two Sides of the Same Coin? – Public Procurement Law Review*.

CONCLUSION

When I first started to write this paper, I was very much inclined to think that the requirements brought forward by law were seriously hindering the efficiency standpoint of procurement. After having studied the history of public procurement in the European Union, I was able to define five generations of public procurement legislation. Starting from the Supply and Works Directive and finishing with the newest legislation from 2014.

In the second chapter of the paper I focused on the current legislation and elaborated on the main concepts of modern public procurement legislation. Most notable of these are the e-procurement and SMEs which were the main focus point of the EU when formulating the legislation. Together with the aforementioned concepts EU put major focus on further streamlining of procurement procedures, one of which is Dynamic Procurement Systems, fully electronic and “improved” version of the more traditional framework agreements.

However, the more I have studied and read on the matter I have come to realise that many of the problems I thought to exist have been already addressed by the new legislation, mainly by the introduction of e-procurement. E-procurement has allowed much of the burdensome notification requirement to be conducted automatically through electronic means. E-procurement does not of course eliminate the work needed for someone to prepare the required documents but does help with the hassle of publishing them.

In the end, I have come to the resolution that the problems still existing in terms of efficiency are not caused by imbalance between principles of transparency and efficiency. In my opinion the main problem at the moment with the legislation is that notification requirements enforced are not harmonized between Member States as they are up to Member States to decide. This causes some Member States to be more tempting markets while others might seem more on the unappealing side as they have stricter rules on publishing of tenders.

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